IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 23, 2002 Session

STATE OF TENNESSEE v. PERRY RAY DAVIS

Appeal from the Criminal Court for Hamilton County
No. 229610 Douglas A. Meyer, Judge

No. E2001-01432-CCA-R3-CD
July 31, 2002

The defendant, Perry Ray Davis, was convicted of driving under the influence, fourth offense, and driving on a revoked license. In this appeal as of right, the defendant challenges his DUI conviction and asserts (1) that the trial court impermissibly relied on facially invalid convictions to enhance his conviction to fourth offense DUI; (2) that because the Georgia DUI statute is not similar to the Tennessee statute, the trial court should not have used his prior DUI convictions from Georgia for enhancement purposes; (3) that the implied consent form used in this case was unconstitutional; and (4) that the 1995 amendment to the Post-Conviction Procedure Act, see Tenn. Code Ann. §§ 40-30-201 to-310, rendered invalid the ruling in State v. McClintock, 732 S.W.2d 268 (Tenn. 1987), which held that the proper procedure for collateral attack on a prior DUI conviction was through the Post-Conviction Procedure Act. The judgment of the trial court is affirmed

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jerry H. Summers, Chattanooga, Tennessee, for the appellant, Perry Ray Davis.

Paul G. Summers, Attorney General & Reporter; Kathy D. Aslinger, Assistant Attorney General; and Thomas Kimball, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

On September 30, 1998, Officer Karl Lewis was driving west on Cummings Highway in Chattanooga when he encountered the defendant driving on the wrong side of the road. Officer Lewis swerved into the opposite lane of traffic to avoid being struck, turned around, and then activated the lights and siren on his cruiser. He observed the defendant's vehicle collide with a truck, strike a parked car in a parking lot, and then crash into the front of a grocery store.

After his vehicle came to a stop, the defendant refused to get out. Officer Lewis removed the defendant, placed him on the ground, and handcuffed him. The officer testified at trial that he immediately noticed the smell of alcohol on the defendant and that the defendant had trouble speaking clearly and maintaining his balance. It was his opinion that the defendant was too impaired to drive. The defendant agreed to submit to a breathalyser test, which indicated a blood alcohol content of .27%.

As proof of the defendant's prior DUI convictions, the state presented certified copies of three convictions. An October of 1990 conviction and an April of 1992 conviction occurred in Dade County, Georgia. A January 1995 conviction occurred in Marion County, Tennessee.

I.

The defendant first asserts that his prior DUI convictions are facially invalid and, thus, cannot be used to enhance his conviction. In State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987), our supreme court ruled that a facially invalid judgment could not be used to enhance punishment in a subsequent prosecution. Later, this court concluded that "the General Assembly did not intend to give credence to facially invalid foreign convictions when a court would not do so with a similar Tennessee conviction." State v. Whaley, 982 S.W.2d 346, 348 (Tenn. Crim. App. 1997).

The defendant contends that the January 1995 conviction is invalid because the face of the judgment does not establish compliance with Tennessee Code Annotated section 55-10-403(g)(1), which provides as follows:

> Any person convicted of an initial or subsequent offense shall be advised, in writing, of the penalty for second and subsequent convictions, and, in addition, when pronouncing sentence the judge shall advise the defendant of the penalties for additional offenses. Written notice by the judge shall inform the defendant that a conviction for the offense of driving under the influence of an intoxicant committed in another state shall be used to enhance the punishment for a violation of § 55-10-401 committed in this state.

Tenn. Code Ann. § 55-10-403(g)(1). This argument cannot be a basis for relief. First, the defendant cites no authority for his position that the failure to document compliance with this statute on the face of the judgment renders the judgment facially invalid. The failure to cite authority operates as a waiver of the issue. See Tenn. R. App. P. 27(a)(7); State v. Eberhardt, 659 S.W.2d 807, 811 (Tenn. Crim. App. 1980). Second, in order to qualify for relief from a judgment, it must be evident from the document that the convicting court lacked jurisdiction. Archer v. State, 851 S.W.2d 157, 162 (Tenn. 1993) (citing State ex rel. Holbrook v. Bomar, 211 Tenn. 243, 247, 364 S.W.2d 887, 889 (1963)). The failure of the judgment to note compliance with Tennessee Code Annotated section 55-10-403(g)(1) does not, in any way, implicate the jurisdiction of the Marion County General

Sessions Court.[1] Any failure to comply with the procedural requirements of the statute would not render a judgment facially invalid. In our view, the defendant's 1995 conviction for DUI is facially valid and could, therefore, be used as a predicate conviction for DUI, fourth offense.

The defendant claims that the DUI convictions in the state of Georgia in 1990 and 1992 are facially invalid because the judgments do not show that the convicting court complied with the requirements set forth in Tennessee Rule of Criminal Procedure 11, State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), and Boykin v. Alabama, 395 U.S. 238 (1969). Initially, the documents in the record pertaining to the 1990 and 1992 convictions establish on their face that the convicting court had jurisdiction over the subject matter and the parties. Thus, "'we must indulge every intendment in favor of the validity of the judgments.'" McClintock, 732 S.W.2d at 271 (quoting Smith v. Leedy, 42 Tenn. App. 117, 123, 299 S.W.2d 29, 31 (1956)). Moreover, each of the judgments contains on its face a written waiver of the defendant's right to counsel. See State v. Tansil, 72 S.W.3d 665, 667 (Tenn. Crim. App. 2001) (citing Burgett v. Texas, 389 U.S. 109 (1967), and holding that "written waiver of the right to counsel is necessary for the facial validity of the judgment because the United States Supreme Court has held that in the context of using a prior conviction against a defendant to support guilt or enhanced punishment for another offense, a record of a conviction that does not show either the existence of counsel or the waiver of counsel is presumptively void").

With regard to other rights that a defendant necessarily waives when entering a guilty plea, our supreme court has held that the failure to fully advise a defendant of those rights "merely renders the related judgment voidable, not void." State v. Neal, 810 S.W.2d 131, 134 (Tenn. 1991). Here, the defendant does not contend that the convicting court failed to comply with Rule 11, Mackey, or Boykin but instead argues that the judgments are invalid because compliance is not documented on their faces. This cannot be a basis for relief. Even if the trial court had failed to fully comply with the rules regarding the acceptance of guilty pleas, the convictions would be voidable and not void. Moreover, if the pleas in those convictions had been involuntarily made, which the defendant does not contend, the convictions would have been voidable, not void. Certainly the 1990 and 1992 Georgia convictions are not facially invalid.

II.

The defendant next contends that the trial court was prohibited from using the Georgia convictions to enhance his sentence because the DUI statutes of Georgia and Tennessee are not similar. This court has considered, and expressly rejected, this argument. See Whaley, 982 S.W.2d 346 (Tenn. Crim. App. 1997). In Whaley, this court held as follows:

> Upon review of the plain language of Tenn. Code Ann. § 55-10-403(l), we find nothing suggesting that the DUI statute of a foreign state must be similar to that of Tennessee's in order to be used as a sentence enhancer. It appears that the state

[1] If the failure to comply with this statute rendered the judgement vulnerable to collateral attack, it would have been incumbent upon the defendant to have first timely attacked its validity in a separate, collateral action under the Post-Conviction Procedure Act. See Tenn. Code Ann. § 40-30-201 to -310.

> legislature simply intended to enhance the punishment for repeat DUI offenders. This Court has held that a defendant's prior DUI conviction from another state could be used to enhance the sentence for a defendant's subsequent DUI conviction in Tennessee. State v. Rea, 865 S.W.2d 923, 924 (Tenn. Crim. App. 1992). This holding remains true regardless of how DUI is defined in a foreign state.

Whaley, 982 S.W.2d at 347. The statute at issue in Whaley provided that "[f]or purposes of enhancing the punishment of a person convicted of violating 55-10-401, the state shall use a conviction for the offense of driving under the influence of an intoxicant that occurred in another state." Tenn. Code Ann. § 55-10-403(1) (1990). The current statute states that "[w]ritten notice by the judge shall inform the defendant that a conviction for the offense of driving under the influence of an intoxicant committed in another state shall be used to enhance the punishment for a violation of § 55-10-401 committed in this state." Tenn. Code Ann. § 55-10-403(g)(1)(1997). In our view, this legislative change does not mandate a departure from the ruling in Whaley. Both statutes authorize out-of-state convictions to be used for enhanced punishment for subsequent DUI convictions in Tennessee.

The defendant argues that the ruling in Whaley should not control because the ruling was contrary to legislative intent. In support of this contention, the defendant submitted legislative history indicating that a similarity requirement was contained in the original draft of the bill. The requirement, however, was removed before the bill was actually passed.

III.

The defendant also claims that the trial court erred by denying his motion to suppress the results of the breathalyser test. He asserts that the implied consent form failed to apprize him of the consequences of submitting to a chemical test to determine his blood alcohol content, thereby preventing a voluntary, knowing, and intelligent decision to submit to the test. Thus, he contends, the implied consent form is unconstitutional. This court has previously rejected an identical argument in reviewing a form substantially similar to that at issue here:

> The form clearly indicates that the purpose of the test is to determine the drug and alcohol content of the accused's blood. If the results of this test were not going to be used to prosecute the charged crime, there would be no purpose for administering the test. This Court has held that admonitions prior to submitting to blood alcohol level test are not required to sustain a valid consent. The average person understands that the results of a[n] intoximeter test will be used against them. The form is neither vague or misleading.

Whaley, 982 S.W.2d at 349 (citing King v. State, 598 S.W.2d 834 (Tenn. Crim. App. 1980)). Again, we see no reason to depart from this conclusion.

IV.

Finally, the defendant asserts that the 1995 amendment to the Post-Conviction Act rendered invalid the ruling in McClintock. In McClintock, our supreme court ruled as follows:

> [u]nless invalid on its face, a prior judgment of conviction in a court with personal and subject matter jurisdiction cannot be collaterally attacked in a subsequent proceeding in which the challenged conviction is used to enhance punishment. The authorized route for attacking a facially valid, final judgment of conviction is by the Post-Conviction Procedure Act.

732 S.W.2d at 272. The defendant contends that this rule is no longer valid because the Post-Conviction Procedure Act now contains a one-year statute of limitations for the filing of post-conviction petitions. On two separate occasions, this court has expressly rejected this argument. See State v. Don Palmer Black, No. 03C01-9812-CR-00424 (Tenn. Crim. App., at Knoxville, Dec. 9, 1999); State v. Phillip Todd Swords, No. 03C01-9807-CR-00239 (Tenn. Crim. App., at Knoxville, Apr. 14, 1999) (where the court "decline[d] to hold the rule announced in McClintock unconstitutional following the institution of a statute of limitations for post-conviction petitions"). Thus, this issue is without merit.

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE